SUPREME COURT, U. S.

MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1597

ULYSSES VERNON BEASLEY,
EMIDIO J. BASSETTI and
JOE W. JONES,

Petitioners,

v.

FOOD FAIR OR NORTH CAROLINA, INC.
and RAY F. MESSICK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

At the February 28, 1972, Session of the Forsyth County Superior Court, the Honorable Judge Robert M. Gambill entered summary judgment for the defendants Food Fair of North Carolina, Inc. and Ray F. Messick. The Court of Appeals of the State of North Carolina, as reported at 15 N.C. App. 323, 190 S.E.2d 33 (1972), reversed the decision of the Honorable Judge Robert M. Gambill. The Supreme Court of the State of North

Carolina, as reported at 282 N.C. 530, 193 S.E.2d 911 (1973), reversed the decision of the Court of Appeals of the State of North Carolina and ordered that judgment be entered affirming the decision of the Honorable Judge Robert M. Gambill.

QUESTIONS PRESENTED

Do the Courts of the State of North Carolina have jurisdiction to adjudicate a claim brought by supervisors against their employer for damages resulting from an alleged unfair labor practice under the provisions of Sections 95-78 through 95-84 of the North Carolina General Statutes?

STATEMENT OF CASE

The petitioners herein were meat market managers for the respondent, Food Fair of North Carolina, Inc., who were discharged allegedly because they actively supported a union in its attempt to organize the company's rank and file employees. The petitioners filed charges with the National Labor Relations Board, claiming that their discharges were unlawful under the National Labor Relations Act, as amended. The Regional Director of the Board dismissed the charges because of "insufficient evidence of violation." He also determined that petitioners were supervisors and not "employees" and therefore not entitled to the protection under the Act. The petitioners appealed the Regional Director's decision, but this appeal was denied by the Board's General Council on the grounds that, as managers, they were supervisors within the meaning of the Act, and therefore not protected by that Act (Appendix, p. A30). The petitioners then filed this action in the Forsyth County Superior Court of the State of North Carolina, alleging that they were unlaw-

fully discharged because of their active support of and membership in the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, in violation of Section 95-81 of the North Carolina General Statutes. The petitioners further requested monetary damages under Section 95-83 of the North Carolina General Statutes. The respondents then filed a motion to dismiss and motion for judgment on the pleadings, alleging, among other things, that supervisors were not included in the protection of the relevant state statutes, and that the Board had exclusive jurisdiction, thereby precluding the state court's consideration under North Carolina law of the facts and circumstances of this case.

The cause was heard before the Honorable Judge Robert M. Gambill during the February 21, 1972, Session of Civil Superior Court in Forsyth County, North Carolina. During the hearing all parties stipulated that each of the petitioners was, at all times complained of, a "supervisor" of Food Fair of North Carolina, Inc., and the trial court entered summary judgment for the respondents on February 28, 1972. Thus, the complete facts and circumstances of this case have not been fully developed through trial or other means.

The Court of Appeals of the State of North Carolina reversed the trial court and held that state courts were not preempted from regulating conduct between employers and supervisors.

The respondents then petitioned for a Writ of Certiorari to the North Carolina Court of Appeals for review of its decision, and on September 14, 1972, that Petition was allowed.

The Supreme Court of North Carolina reversed the ruling of the Court of Appeals, holding that because the petitioners sought to invoke a remedy inconsistent with national labor policy, North Carolina state courts were

precluded under the federal preemption doctrine from asserting subject matter jurisdiction over the case. The Supreme Court of North Carolina did not reach the issue of whether or not the petitioners, as supervisory personnel, came within the provisions of Sections 95-78, 95-81 and 95-83 of the North Carolina General Statutes and that issue has as yet not finally been determined by the North Carolina Supreme Court.

The petitioners then petitioned the Supreme Court of the United States for Writ of Certiorari to the Supreme Court of North Carolina.

REASONS FOR DENYING WRIT

Prior case law has clearly established that a state has neither the jurisdiction nor the authority to regulate conduct between labor and management where such conduct is protected by Section 7 (29 U.S.C.A. 157), or prohibited by Section 8 (29 U.S.C.A. 158) of the National Labor Relations Act, as amended. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). This Court has also clearly decided that whether a particular activity is protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act, as amended, must be left in the first instance to the National Labor Relations Board, at least in those instances where the question has not been clearly determined otherwise. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed. 775, 79 S.Ct. 773 (1959); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965).

In the present case the petitioners did file charges with the National Labor Relations Board, which charges were

dismissed because of insufficient evidence of violation and because the petitioners were supervisors and not employees, and therefore were not entitled to the protection of the National Labor Relations Act. A subsequent appeal to the Board's General Council, was also denied on the grounds that the petitioners were supervisors within the meaning of the Act, and therefore did not come within the protection of the National Labor Relations Act (See letter of NLRB General Council, Appendix p. A30).

Although the present case does not come within the bounds of the more established "arguably" test utilized by the United States Supreme Court in *San Diego Unions v. Garmon*, supra, this Court further recognized an additional area not open to state jurisdiction. Thus, in *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965), this Court stated the following guidelines:

> The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by §7, or prohibited by §8' of the National Labor Relations Act, see 359 U.S., at 244-246, *and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against State regulation*, cf. 359 U.S., at 245. (Emphasis added)

This second area of activity, that is that activity neither protected nor prohibited which legislative purpose dictated be privileged against state regulation, is clearly the area within which this case lies. The legislative purpose, as revealed by the legislative history surrounding the 1947 amendments to the National Labor Relations Act, clearly reveals that Congress did intend to relieve

employers from any compulsion under the Act and under state law to bargain with or be restricted in their dealings with supervisors or a union of supervisors. In the House Report No. 245, 80th Congress, 1st Session, beginning at page 14, the following remarks clearly indicate Congress' purpose:

> "The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file boss them. The evidence shows that rank and file unions have done much of the actual organizing of foremen, even when the foremen's union professes to be 'independent'. Without any questions, this is why the unions seek to organize the foremen." *Id.* at 14.
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>
> "MANAGEMENT, LIKE LABOR, MUST HAVE FAITHFUL AGENTS.—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or

control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations." *Id.* at 16.

* * * * *

"So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an 'employer', not an 'employee', any person 'acting in the interest of the employer'; what it again made clear in taking up H.R. 2239 in 1943 and in dropping it when the Board decided the MARYLAND DRYDOCK case, and what, for a third time, it made clear last year in passing the CASE bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of this bill.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom for any reason, he does not trust.

"If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then CONGRESS MUST EXCLUDE FOREMEN FROM THE OPERATION OF THE LABOR ACT, NOT ONLY WHEN THEY

ORGANIZE INTO UNIONS OF THE RANK AND FILE AND INTO UNIONS AFFILIATED WITH THOSE OF THE RANK AND FILE, BUT ALSO WHEN THEY ORGANIZE INTO UNIONS THAT CLAIM TO BE INDEPENDENT OF THE UNIONS OF THE RANK AND FILE." *Id.* at 15. (Emphasis in original.)

* * * * *

"As under the present Act, the power of the Board under the amended Act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision . . . to give to the States a concurrent jurisdiction in respect to closed-shop and other union security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. IT CAN READILY BE SEEN WHAT MISCHIEF MIGHT BE WROUGHT IF, FOR EXAMPLE, FOREMEN SHOULD BE SUBJECT TO STATE LAW AT THE SAME TIME THAT THE WORKERS THEY SUPERVISE ARE SUBJECT TO NATIONAL LAW. MOREOVER, THE BILL HEREWITH REPORTED VERY DEFINITELY STATES A NATIONAL POLICY IN RESPECT TO ORGANIZATION AND COLLECTIVE BARGAINING BY FOREMEN." House Report No. 245, 80th Congress, p. 40. (Emphasis added.)

The same theme is found in the Senate Committee Reports on the 1947 Taft-Hartley Amendment, and in particular Senate Report No. 105, 80th Congress, 1st Session, page 5:

"In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer

> from recognizing a union of foremen. It merely relieves employers who are subject to the national Act free from any compulsion by this National Board OR ANY LOCAL AGENCY to accord to the front line of management the anomalous status of employees." *Id.* at 5. (Emphasis added.)

Since the 1947 amendments to the Act, the federal courts have consistently held that a supervisor is not protected under the Act from discharge due to union membership or activity. *NLRB v. Inter-City Advertising Company*, 190 F.2d 420 (4th Cir. 1951), *cert. den.*, 342 U.S. 908, 96 L.Ed. 679, 72 S.Ct. 301 (1952); *NLRB v. Fullerton Publishing Company*, 203 F.2d 545 (9th Cir. 1960); *NLRB v. Big Three Welding Equipment Company*, 359 F.2d 77 (5th Cir. 1966).

As noted by the Supreme Court of North Carolina in its decision in this case (Appendix, p. A10), the federal courts have gone further than simply holding that the National Labor Relations Act does not afford supervisory personnel protection. These courts have also clearly recognized the existence of the legislative purpose on the part of Congress to leave employers unfettered in dealing with union affiliation on the part of their supervisory personnel. Thus in the case of *NLRB v. Edward G. Budd Mfg. Company*, 169 F.2d 571 (6th Cir. 1948), *cert. den.*, 335 U.S. 908, 93 L.Ed. 441, 69 S.Ct. 401 (1949), one of the first cases concerning supervisors after the 1947 amendments to the National Labor Relations Act, congressional intent was emphasized as follows:

> "We believe that it is clear that Congress intended by the enactment on the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities. . . . " 169 F.2d at p. 579.

Similarly, in *NLRB v. Retail Clerks Inter. Ass'n.*, 211 F.2d 759 (9th Cir. 1954) the legislative purpose was discussed at length, as follows:

> "A primary objective of §2(11) of the Act, to which reference is made in this paragraph of the decree, was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers. The reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made this abundantly clear. The reports were specific as to certain evils which the congressional committees thought they could avoid by excluding foremen and other supervisors from the operation of the Labor Act." 211 F.2d, at page 763.

Further, congressional intent was also considered in the case of *Carpenters District Council, etc. v. NLRB*, 274 F.2d 564 (D.C. Cir. 1959) as evidenced by the following excerpt:

> "... Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations ..." 274 F.2d, at page 566.

The national labor policy obviously intended by the legislature and expressed by the courts of allowing employers relative freedom in dealing with supervisory personnel in order to insure their loyalty, is obviously only a part of the balance of protection, prohibition, and

laissez faire with respect to union organization, collective bargaining, and labor disputes struck by Congress in the framework provided for in the National Labor Relations Act and the Labor Management Relations Act.

In the case of *Teamsters Local 20 v. Morton*, 377 U.S. 252, 12 L.Ed. 2d 280, 84 S.Ct. 1253 (1964), the United States Supreme Court was faced with the question of whether or not a state was preempted from regulating labor management relations where those regulations would upset the congressional balance of protection, prohibition, and laissez faire, even though the activities to be regulated are neither protected nor prohibited by Sections 7 and 8 of the National Labor Relations Act. In that case Morton was engaged in hiring out trucks and drivers for use in highway construction, and Local 20 represented Morton's employees. During a strike over the terms of a new collective bargaining agreement, Local 20 persuaded the management of one of Morton's customers to refrain from doing business with Morton during the strike. Since the customer was not threatened with any form of reprisal, the persuasion to boycott Morton was not an unfair labor practice, and Local 20 appears to have agreed that it was not protected by Section 7 of the National Labor Relations Act. However, the persuasion of customers was a violation of Ohio law, and an inferior federal court awarded damages for that violation. In reversing the decision of the lower federal court, the Supreme Court of the United States acknowledged that the activity was neither protected nor prohibited, but was nonetheless inimical to the national labor policy:

> "It is the respondent's contention, however, that since the petitioner union's peaceful conduct was neither arguably protected under §7 nor arguably prohibited under §8 of the National Labor Relations Act, as amended, the trial court was free to

award damages on the basis of state law for injuries caused by this conduct. But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303, 'Congress occupied this field and closed it to state regulation.' *Automobile Workers v. O'Brien*, 339 U.S. 454, 457, 94 l Ed. 978, 983, 70 S.Ct. 781. The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102 7 L.Ed. 2d 593, 598, 82 S.Ct. 571. *The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation."* (Italics supplied) 377 U.S., at 258.

and further,

"This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761 v. Local Board*, 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [8(b)(4)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of legal policy as if the state

were to declare picketing free for purposes or by methods which the federal Act prohibits.' *Garner v. Teamsters Union*, 346 U.S. 485, 500. 377 U.S., at 259, 260.

The present case is indeed an even easier one than that of *Teamsters Local 20 v. Morton, supra*, in that the issue presented in the case at bar is one in which Congress has clearly evidenced its intent, as previously discussed. The relevant North Carolina statute is a clear attempt at state regulation of almost the entire area reserved by Congress to the National Labor Relations Board, and indeed if the petitioners were employees rather than supervisors, precedent would clearly dictate that state jurisdiction be preempted. If, for some reason, the national labor policy is not found to preempt the application of state law in this case, at least in North Carolina, supervisors will be subject to state law and entitled to damages awarded by state courts for violations of that law, at the same time that the workers they supervise will be subject to the regulations of the NLRB with its accompanying sanctions and reinstatement of wages. The result would be a lack of national uniformity and a serious imbalance in the relative strength of labor and management. As previously noted in the excerpt taken from House Report No. 245 of the 80th Congress, this was one of the shortcomings which Congress sought to avoid by the 1947 Taft-Hartley amendments. Congress, in forming a balance between labor and management in the 1947 amendments, necessarily decided not only what course of tactics should be forbidden to the unions and to management, but also what methods of persuasion should be permitted by both employers and unions. This permissiveness with regard to employers included a nation-wide labor policy of allowing employers to deal directly with supervisors, in

order to insure their loyalty and maintain a balance between labor and management.

Perhaps the only decision in which the United States Supreme Court has been faced with a case involving supervisors in a labor context, is that of *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). In *Hanna Mining* the plaintiff employers refused to bargain with the Marine Engineers Union until it was ascertained that the Union represented a majority of the engineers. In an obvious attempt at coercion, the Union then began picketing the plaintiffs' ships. The employers, charging a violation of Section 8 (29 U.S.C., §158) of the National Labor Relations Act, petitioned the National Labor Relations Board for representative elections. The Board dismissed the petition on the grounds that the engineers, as "supervisors," were excluded from the definition of employees under the Act. The plaintiffs then sued in Wisconsin state court for an injunction under a Wisconsin law which increased the restrictions on supervisor organizing. The lower state court dismissed for a lack of jurisdiction, and the Supreme Court of Wisconsin affirmed on the grounds that the picketing was not only illegal under state law but also arguably violated Section 8(b)(4)(B) and Section 8(b)(7) of the Act [29 U.S.C., §153(b)(4)(B) and §158(b)(7)]. The United States Supreme Court reversed in an eight member majority, deciding that Congress had made no considered decision generally to exclude state limitations on supervisory organizing. In answer to the Union's argument that state jurisdiction was preempted because of the congressional intent under Section 14(e) to adopt a laissez-faire attitude toward *supervisory organizing*, Mr. Justice Harlan, in writing for the majority, stated:

"This broad argument fails utterly in light of the legislative history, where the Committee reports reveal Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the legislatures fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted Section 8(b) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing . . . " 382 U.S., at 189.

In the above passage the United States Supreme Court certainly sanctioned the same national labor policy as was recognized by the Supreme Court of North Carolina in the instant case. However, in *Hanna Mining* the Wisconsin state law was both consistent and compatible with the national labor policy of allowing employers to deal unhampered with supervisors. Certainly Congress did not decide, nor was there any legislative history that Congress did not decide, nor was there any legislative history that Congress intended that unions should be free to coerce supervisors into joining unions and employers into recognizing supervisory unions. As noted by the United States Supreme Court in footnote 14, 382 U.S. 193, the conduct considered in *Hanna Mining* did not fall in that middle range impliedly withdrawn from state control, although not arguably protected by the Act. Indeed, the secondary pressure intended to coerce unwilling supervisors into accepting the representation of the union was one in which the state courts of Wisconsin had a valid and very real interest, and in which the necessity for federal preemption was at a minimum. If state injunctive relief had been preempted, the plaintiffs would have been

compelled to bargain with the supervisory union. This in turn would have frustrated the national labor policy against such pressure on employers.

Unlike *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965), the present case does not involve a state statute which is consistent with and in furtherance of national labor policy. Whether applied to employees or supervisors, Sections 95-78 through 95-84 of the North Carolina General Statutes represents an attempt by the state to regulate and control on a local level and in a different manner that which Congress intended to reserve on a national level. In short, the statutes involved in the case at bar are inconsistent with the national labor policy of allowing employers to insure the loyalty of their supervisors in order to maintain a balance in the organization and bargaining between labor and management.

It is the position of these respondents that the decision of the North Carolina Supreme Court was entirely in line and in support of the national labor policy expressed and intended by Congress in the 1947 Taft-Hartley amendments, and with the previous decisions of this Supreme Court and *San Diego Unions v. Garmon*, 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959); *Teamsters Local 20 v. Morton*, 377 U.S. 252, 12 L.Ed. 2d 280, 84 S.Ct. 1253 (1964); and *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). The respondents further submit to this Supreme Court that the case at bar is not a proper case to be heard, in that the facts in the case have not been fully developed by trial, the applicable state statutes have not been finally construed by the North Carolina Supreme Court to include or exclude the petitioners as supervisors, and the statutes involved are relatively unique, rendering a

decision by this Supreme Court of little benefit outside of North Carolina.

CONCLUSION

The respondents respectfully submit that the decision of the North Carolina Supreme Court was correct and should be sustained by a denial of this Petition for Writ of Certiorari. The respondents further submit that this case is not ready for review by this Court because the applicable state statute has not been finally construed nor the facts fully developed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, H. Gardner Hudson, hereby certify that on this day I served copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon counsel of record for the Petitioners by depositing copy thereof in the United States Mail in Winston-Salem, North Carolina, postage prepaid, and addressed as follows:

Mr. Larry L. Eubanks
503 NCNB Plaza
Winston-Salem, North Carolina 27101

This the 19th day of June, 1973.

H. Gardner Hudson
Attorney for Respondents